

LEVER

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-201568

DATE: July 30, 1981

MATTER OF: ConDiesel Mobile Equipment Division

DIGEST:

1. GAO will not consider objections regarding solicitation specifications which protester is obligated to meet by virtue of current contract since protester is required to submit all claims arising under current contract to the contracting officer by standard Disputes clause and Contract Disputes Act of 1978. GAO consideration of objections would permit protester to circumvent claim resolving process of protester's current contract.
2. Allegation that defueling requirements contained in solicitation are impossible to meet, filed after initial closing date, is untimely where protester does not allege that defects were latent and where record indicates that protester should have known of its objections prior to the initial closing date.
3. Allegation that agency engaged in improper negotiations with awardee after submission of best and final offers is timely where filed within 10 working days of when protester obtained information providing basis of protest and where there is no evidence that protester knew of basis of protest prior to receiving information from contracting agency.
4. Protester diligently pursued information which led to basis of objections regarding award of contract where protester made initial request for information approximately two weeks after protester was on constructive notice of award and continually sought information until it was obtained more than a month later.

[Protest of Performance Specification in Air Force Solicitation]

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ConDiesel Mobile Equipment Division has protested certain performance specifications contained in solicitation No. F09603-80-R-1344, issued by the Department of the Air Force for the purchase of R-9 aircraft refueling trucks. ConDiesel has also protested the procedures employed by the Air Force to award a contract under the solicitation to Kovatch Corporation. Kovatch has vigorously objected to our consideration of ConDiesel's protests on the ground that they are clearly untimely; the Air Force also asserts the untimeliness of one of the protests. In light of the dispute over timeliness, and at the request of Kovatch, we are issuing this interim decision. Although ConDiesel and the Air Force initially acquiesced in our decision to honor Kovatch's request for an interim decision on the timeliness of ConDiesel's protests, ConDiesel has recently objected to our decision to issue an interim decision. However, by the time we received ConDiesel's objections, a substantial effort had been expended in honoring Kovatch's request. Therefore, we are issuing this decision notwithstanding ConDiesel's objections.

The solicitation was issued by the Air Force on June 10, 1980. Among other things, the solicitation required that the pumping operation sound levels of the R-9 refueler not exceed 90 dBA when measured at a distance of 15 feet from the geometric center of the truck cab or at the operator's position in front of the pumping compartment. The solicitation also required that the refueler have a minimum defueling rate of 200 gallons per minute (gpm) at temperatures ranging from -40 to +125 degrees Fahrenheit.

Initial proposals were received by the Air Force on September 22, 1980. Discussions were then held with all offerors and best and final offers were requested and received on October 31. Following an evaluation of the final offers, the Air Force determined that Kovatch had submitted the low offer. Since the solicitation provided that award would be made to the low acceptable offeror, the Air Force initiated a preaward survey of Kovatch.

As a result of the preaward survey, the Air Force became concerned about whether the chassis Kovatch intended to use might experience reliability problems. Specifically, the Air Force was concerned that the International Harvester chassis Kovatch intended to use would have excessive flexing resulting in serious cracking problems since its section modulus was smaller than the chassis of earlier R-9 refuelers which experienced serious cracking problems. Consequently, by a letter dated December 18, 1980, the Air Force advised Kovatch of its concerns and requested Kovatch to comment on them.

The Air Force further requested that Kovatch provide specific information as to how the Air Force could be assured that cracking problems would not result and proposed conducting a strain gauge test on the proposed refueler during first article testing.

By a telegram dated December 24, 1980 Kovatch agreed to permit the Air Force to conduct a strain gauge test of the chassis of its refueler during first article testing and agreed to submit additional comments regarding the Air Force's concerns. Kovatch also agreed to extend its offer until January 16, 1981 as a result of a protest filed by ConDiesel on December 18, 1980, which alleged that certain specifications contained in the solicitation were impossible to meet. Subsequently, Kovatch refused to extend its offer beyond January 16, 1981 and the Air Force awarded the contract to Kovatch notwithstanding ConDiesel's protest on January 16, 1981.

ConDiesel maintains that the solicitation specifications regarding noise level limits are impossible to meet and that it was unaware of this problem until mid-December 1980. In this connection, ConDiesel indicates that it is currently under contract for R-9 refuelers and that on September 27, 1980 it failed a first article test relating to identical noise level limits. ConDiesel states that the noise level requirements of the solicitation and its current contract are more stringent than those of earlier R-9 procurements. ConDiesel further indicates that it attempted to correct this problem over a two-month period by retaining an industrial noise expert and consulting with manufacturers of various key components. ConDiesel contends that this effort was unsuccessful and that private tests conducted during December establish that the noise level limits cannot be met.

The Air Force and Kovatch contend that ConDiesel's objections to the noise level requirements are untimely since they were not made until well after the September 22, 1980 closing date for initial proposals. See 4 C.F.R. § 21.2(b)(1)(1981). The Air Force and Kovatch further contend that even if we conclude that the alleged defects ConDiesel complains of were not apparent prior to the initial closing date, ConDiesel's objections are untimely since they were not filed within 10 working days of when ConDiesel knew or should have known of the alleged defects. See 4 C.F.R. § 21.2(b)(2). In this regard, Kovatch argues that ConDiesel knew or should have known the

basis of its protest by September 27, 1980, the day it failed the first article test relating to the noise level limits under its current contract. Similarly, the Air Force maintains that ConDiesel knew or should have known the basis of its protest no later than November 19, the day the Air Force only conditionally accepted ConDiesel's first article due to ConDiesel's failure to meet the noise level restrictions.

Section 21.2(b)(1) of our Bid Protest Procedures provides that protests based on alleged improprieties which are apparent on the face of the solicitation shall be filed prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(b)(1). The crux of ConDiesel's protest is that the alleged impossibility of achieving the noise level requirements was not apparent prior to the closing date for submission of initial proposals but rather became apparent only after the protester attempted to comply with identical requirements contained in its current contract. In other words, ConDiesel is essentially asserting that the alleged defects were latent ones and not readily apparent on the face of the solicitation. Nevertheless, we need not decide whether ConDiesel's objections regarding the noise level requirements are untimely because we believe it would be inappropriate to consider them in any event.

ConDiesel is currently under an obligation to meet the noise level specifications in question by virtue of its current contract. As a contractor, it is free to challenge the noise level requirements under the Disputes clause of the current contract. In fact, ConDiesel is required to submit all such claims with the contracting officer by virtue of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III 1979).

We do not think our Office should provide ConDiesel with what is essentially another forum to decide the same issue. If ConDiesel wants to argue that the noise level requirements are impossible to meet, it should make its arguments under the Disputes clause of its present contract and not before our Office in a proceeding designed to force a change in the specification requirements. Our consideration of ConDiesel's objections would permit the contractor to circumvent the claim resolving process of its current contract through the bid protest process.

ConDiesel also alleges that the minimum defueling rate of 200 gpm cannot be met at extremely cold (-40°F) or extremely hot (+125°F) temperatures as required by the solicitation. ConDiesel asserts that the design specifications of the solicitation differ from ConDiesel's current contract and earlier contracts for R-9 refuelers in that the location of the defuel hose reel does not permit a constant elevation run and that fuel in the suction line must now be diverted 180 degrees before the pump inlet. ConDiesel states that it was only able to achieve and maintain a 200 gpm flow on its current contract and a 201 gpm flow on earlier contracts at local ambient conditions, and that therefore it will be impossible to meet the 200 gpm requirement at extreme ambient conditions given the constraints of the more stringent design requirements of this procurement.

The Air Force and Kovatch maintain that ConDiesel's objections to the minimum defueling requirements are untimely because they were not filed prior to the closing date for receipt of initial proposals. We agree. The protester does not assert that the alleged defects relating to the defueling rate requirements were not readily apparent on the face of the solicitation and that it did not have sufficient experience with the requirement. In this regard, we note that the protester argues that it recognized after the initial closing date that the defueling rate requirements are impossible to meet because it was only able to maintain a minimum flow of 201 gpm on its earlier R-9 refueler contracts under more favorable design constraints. ConDiesel does not, however, explain why it was unable to recognize the alleged defects prior to that date. Accordingly, this basis of protest will not be considered.

ConDiesel further objects to the award to Kovatch on the grounds that the Air Force engaged in improper negotiations with Kovatch after the submission of best and final offers. Specifically ConDiesel alleges that the contracting officer improperly encouraged Kovatch to switch from an International Harvester chassis to a Mack chassis after best and final offers and before award. ConDiesel contends the switch resulted from the contracting officer's concerns regarding the International Harvester chassis proposed by

Kovatch and the improper transference of ConDiesel's technical information on the International Harvester and Mack chassis. The protester further argues that even if the switch took place after award, the Air Force improperly permitted Kovatch to cure a technically unacceptable offer after best and final offers by allowing Kovatch to provide assurances that the International Harvester chassis would not have reliability problems and by conditioning the award on "unusual and stringent tests of its strength."

Kovatch contends that these objections filed on April 8, 1981 are untimely under 4 C.F.R. § 21.2(b)(2) since they were not filed within 10 working days of when ConDiesel knew or should have known the basis of its protest. In this connection, Kovatch asserts that ConDiesel knew no later than February 12, 1981, that Kovatch intended to use a Mack chassis because on February 12, ConDiesel wrote to it warning it against use of any proprietary information and technology developed by ConDiesel.

Kovatch further contends that even if ConDiesel did not know that Kovatch originally proposed to use an International Harvester chassis, the objections are untimely since ConDiesel failed to diligently pursue the basis of its protest. In this regard, Kovatch maintains that ConDiesel did not file the Freedom of Information Act request which ConDiesel says led to the basis of its protest until March 11, 1981, long after the time ConDiesel learned of the award to Kovatch. Kovatch argues that ConDiesel had an obligation to proceed diligently in pursuing information which would establish the basis of its protest and that its failure to do so results in its objections regarding the award procedures being untimely. See, e.g., National Systems Management Corporation, B-198811, October 10, 1980, 80-2 CPD 268; National Council of Senior Citizens, Inc., B-196723, February 1, 1980, 80-1 CPD 87.

We do not agree that ConDiesel's objections regarding the award procedures are untimely. The fact that ConDiesel wrote to Kovatch warning it against using any proprietary information or technology developed by ConDiesel under its current contract merely establishes that ConDiesel was aware that Kovatch had been awarded the contract notwithstanding ConDiesel's earlier protest. It does not establish that ConDiesel knew that Kovatch intended to use a Mack chassis, although it is clear that ConDiesel subsequently learned this fact. Even if we assume that the letter displays such knowledge on ConDiesel's part, we fail to see the relevance. ConDiesel's objections are not based on Kovatch's use of a Mack chassis but on Kovatch's switch from an International Harvester chassis to a Mack chassis and to the contacts between Kovatch and the Air Force after best and final offers were due which led to the award of the contract to Kovatch. Thus, any knowledge on ConDiesel's part regarding Kovatch's plans to use a Mack chassis did not put ConDiesel on constructive notice of the basis of its protest.

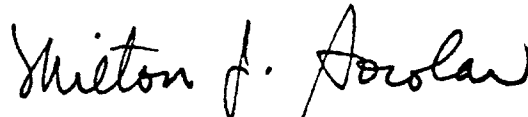
Furthermore, we do not agree that ConDiesel failed to diligently pursue the basis of its protest. Contrary to the assertions of Kovatch, the record indicates that ConDiesel attempted to obtain a copy of Kovatch's proposal on several occasions prior to its March 11 request. In this regard, we note that following its receipt of the agency's report on February 18, ConDiesel advised us that it had not received the attachments to the report, including Kovatch's proposal, and requested that we furnish such documentation. After conferring with the Air Force, we provided ConDiesel certain attachments to the report but did not provide a copy of Kovatch's proposal and certain other information which the Air Force refused to release. Thereafter, on February 27, we received a telegram from ConDiesel informing us that it had received the information forwarded by us and that it had been advised by the contracting officer to request a copy of Kovatch's proposal and other documentation from the Air Force in Washington. However, by telegram dated March 3, ConDiesel again requested the information. After conferring with the Air Force, we provided the remaining documentation except for a copy of Kovatch's proposal and advised ConDiesel that it should request a copy of Kovatch's proposal from the contracting officer. The record indicates that ConDiesel followed

this advice and on March 11, 1981, again requested from the contracting officer a copy of Kovatch's proposal. The record further indicates that by a letter dated March 24 and received on March 26, the Air Force provided ConDiesel with a portion of Kovatch's proposal, including Kovatch's December 24, 1980 telegram agreeing to a strain gauge test of its proposed International Harvester chassis during first article testing.

Based on the above, we believe it is clear that ConDiesel diligently pursued the basis of its objections regarding the award to Kovatch. In our opinion, the cases cited by Kovatch, i.e., National Systems Management and National Council of Senior Citizens, supra, are readily distinguishable. In National Systems Management the protester was directly responsible for a delay of eight weeks in obtaining information under the Freedom of Information Act, while in National Council of Senior Citizens the protester waited more than five weeks to request under the Freedom of Information Act information which led to the basis of its protest. Here, however, it was the agency's actions and not the protester's which were primarily responsible for the delay in the protester obtaining the information which provided the basis of the protest. Although ConDiesel did not initially request a copy of Kovatch's proposal until after it received a copy of the Air Force's report, we cannot find that such a delay was unreasonable. There is no evidence of ConDiesel's knowing of the award prior to its February 12 letter to Kovatch warning it against use of ConDiesel's proprietary data approximately one week before its initial request for a copy of Kovatch's proposal. In addition, the earliest ConDiesel would have been on constructive notice of the award was February 9, the day of notice of the award was published in the Commerce Business Daily. MTS Systems Corporation, B-200131, September 30, 1980, 80-2 CPD 234. Consequently we cannot hold that the delay was unreasonable.

As ConDiesel filed its objections regarding the procedures used by the Air Force in making the award to Kovatch on April 8, nine working days after it received a copy of Kovatch's proposal and other relevant documentation, the objections are timely under section 21.2(b)(2) of our procedures.

In summary, we will not consider ConDiesel's objections regarding the solicitation's noise level requirements and the defueling requirements. We will, however, proceed with consideration of the merits of ConDiesel's objections regarding the award to Kovatch.

A handwritten signature in dark ink, appearing to read "Milton J. Aorolan". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

Acting Comptroller General
of the United States